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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28;
Framework for Broadband Internet Service, GN Docket No. 10-127

Dear Ms. Dortch:

On Monday, December 22, 2014, Maggie McCready, Roy Litland and I, on behalf of Verizon, met with Roger Sherman, Brian Regan and Joel Taubenblatt of the Wireless Telecommunications Bureau and Stephanie Weiner of the Office of General Counsel to discuss the above-mentioned matters. We explained that the recent arguments made by various parties who claim the Commission can subject mobile broadband Internet access service to common carrier regulation[1] are foreclosed by the express statutory restriction in Section 332(c) against applying common carriage requirements to private mobile services such as broadband Internet access, and their claims to the contrary are misplaced. We also explained that some of the arguments now being put forth to circumvent this clear statutory bar—such as redefining "the public switched network" to mean the Internet—are not only substantively wrong, but also are procedurally barred given the lack of notice to support the suggested Commission action.

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[1] *See* Letter from Michael Calabrese for the Public Interest Organizations, to Marlene H. Dortch, FCC, GN Dkt. Nos.14-28, 10-217 (Dec. 11, 2014) ("OTI/PK/CDT Letter"); Letter from Joshua Bobeck, Counsel for Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos.14-28, 10-217 (Dec. 11, 2014) ("Vonage Letter"); Letter from Michael Calabrese, Director, Open Technology Institute New America, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos.14-28, 10-127, at 4-9 (Nov. 17, 2014) ("OTI Nov. 17 Letter"); Letter from Michael Calabrese, Open Technology Institute, to Marlene H. Dortch, FCC, GN Dkt. Nos.14-28, 10-127 (Nov. 10, 2014); Letter from Matthew F. Wood, Free Press, to Marlene H. Dortch, FCC, GN Dkt. Nos.14-28, 10-127, at 1-3 (Dec. 17, 2014).

Section 332 Precludes Common Carrier Regulation of Mobile Broadband Internet Access. In 1993, Congress amended the Communications Act to ensure like treatment of competing forms of mobile voice services and to preclude common carriage regulation of the evolving private mobile wireless marketplace. In Section 332(c)(2), Congress defined two separate categories of wireless services, "commercial mobile services" (CMRS) and "private mobile services" (PMRS). That section expressly limited common-carriage regulation to "commercial mobile services," which it defined to include services offering interconnection with "the public switched network," or their functional equivalent.[2] Congress also indicated that providers of PMRS (*i.e.*, services not interconnected with the public switched network) "shall *not* be treated as a common carrier *for any purpose* under this [Act]."[3] Thus, in setting these bounds on the scope of common carriage for wireless services, Congress was clear. The only services subject to common-carriage were those interconnected with "the public switched network" (or their functional equivalent).

Congress and the statute were equally clear as to what Congress meant when it said "*the* public switched network." Congress was using a well-understood term of art synonymous with the term "public switched telephone network." As explained below, Congress, the Commission, and the courts have understood as much and used these terms interchangeably for more than two decades. They have been similarly consistent that "the public switched network" does not refer to the Internet. As recently as two years ago, Congress again confirmed as much when it adopted statutory language distinguishing "the public switched network" and the "public Internet."[4]

Under the straightforward terms of the statute, therefore, a service like mobile broadband that is not interconnected with the public switched telephone network is a "private mobile service" and is statutorily exempt from common carrier regulation.

The Commission Has Properly Interpreted the Statute to Bar Common Carrier Regulation of Wireless Broadband Internet Access. The Commission interpreted the key terms Congress had used in Section 332 in the *Second CMRS Order*.[5] Congress had specified that, in order to constitute CMRS, an offering must be "interconnected with the public switched network (as such terms are defined by regulation by the Commission)."[6] While recognizing that "the public switched network" (PSTN) was "continuously growing and changing because of new technology and increasing demand," the Commission's approach recognized that the network Congress had in mind in Section 332 was the PSTN.[7] The Commission held that "use of the

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[2] 47 U.S.C. § 332(c)(1) (c)(2), (d).
[3] *Id.* § 332(c)(2) (emphasis added).
[4] *See* 47 U.S.C. § 1422(b)(1) (stating that the nationwide public safety network should provide connectivity between the radio access network and "the public Internet or the public switched network, or both").
[5] *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994) ("*Second CMRS Order*").
[6] 47 U.S.C. § 332(d)(2).
[7] *Second CMRS Order*, ¶ 59.

North American Numbering Plan by carriers providing or obtaining access to the public switched network is a key element in defining the network because participation in the North American Numbering Plan provides the participant with ubiquitous access to all other participants in the Plan."[8] It likewise emphasized that interconnection with the "traditional local exchange or interexchange switched network" was a critical factor in identifying CMRS offerings.[9] It thus defined the term "public switched network" to mean "[a]ny common carrier switched network . . . including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services."[10] In other words, the Commission provided the technical definition of "the public switched network" by describing the various attributes of the PSTN.

Consistent with this approach and with the statutory language, the Commission held in 2007 that wireless broadband Internet access services could not be CMRS, because they were not interconnected with the public switched network.[11] It reiterated that use of North American Numbering Plan (NANP) numbering is a central component of the "public switched network" and thus a necessary precondition to labeling a service CMRS.[12] It recognized that wireless broadband Internet access did not offer access to NANP numbers. While voice over Internet protocol (VoIP) applications that rely on mobile broadband might permit users to reach NANP numbers, mobile broadband itself does not:

> Mobile wireless broadband Internet access service in and of itself does not provide this capability to communicate with all users of the public switched network. For example, mobile wireless broadband Internet access services do not use the North American Numbering Plan to access the Internet, which limits subscribers' ability to communicate to or receive communications from *all* users in the public switched network. Instead, users . . . need to rely on another service or application, such as certain Voice over Internet Protocol (VoIP) services that rely in part on the underlying Internet access service, to make calls to, and receive calls from, "all other users on the public switched network." Therefore, mobile wireless broadband Internet access service itself is not an "interconnected service" as the Commission has defined the term in the context of section 332.[13]

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[8] *Id.* ¶ 60.
[9] *Id.*
[10] 47 C.F.R. § 20.3.
[11] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 45 & nn.117-18 (2007) ("*Wireless Broadband Order*") (quoting 47 C.F.R. § 20.3).
[12] *See id.*, ¶ 44.
[13] *Id.* ¶ 45 (quoting 47 C.F.R. § 20.3).

VoIP Does Not Render Mobile Broadband CMRS. Several commenters have argued that the availability of VoIP service demonstrates that mobile broadband *does* permit access to the PSTN, and therefore is an "interconnected" CMRS offering.[14] These commenters are wrong. As the Commission recognized in 2007, there is a critical distinction between a broadband service and the various applications and services that use it. So, for example, Vonage and others offer VoIP or messaging services that may use NANP telephone numbers and, that, after first connecting to and traversing the Internet, in some instances ultimately connect to customers of traditional voice services on the PSTN. But the fact that those VoIP applications may interconnect with the public switched network after their traffic leaves the Internet does not mean that broadband services themselves are so connected. They are not; they are connected to the Internet.

The Commission has for decades classified services based on their own properties, not the properties of distinct services that ride over them.[15] In particular, it repeatedly has applied regulations to "interconnected VoIP" services without applying any such requirements to the underlying broadband offerings—or even suggesting that the classification of the two are related.[16] Thus, whether or not VoIP services permit interconnection with the PSTN is irrelevant to whether the underlying broadband service is itself interconnected with the PSTN.[17] Commenters' arguments at most suggest that VoIP or messaging services offered by Vonage and others may themselves be interconnected services, not that mobile broadband is. Broadband Internet access services provide only a dedicated connection "directly to the Internet through

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[14] *See, e.g.*, OTI Letter at 5; Vonage Letter at 5.

[15] *See, e.g.*, *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, ¶¶ 15, 16 (2007) ("regulatory classification of the [VoIP] service provided to the ultimate end user has no bearing on" the regulatory status of the entities "transmitting [the VoIP] traffic"); *IP-Enabled Services*; *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶¶ 22-25 (2005) ("*VoIP E911 Order*"), *aff'd sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006) (imposing E911 obligations on interconnected VoIP service providers, but not on other IP services provided over broadband facilities, irrespective of ultimate regulatory classification of VoIP).

[16] *See Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order, 27 FCC Rcd 2650 (2012) (imposing outage reporting requirements on interconnected VoIP providers but not other broadband Internet services); *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶¶ 34-37 (2006), *vacated on other grounds sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1282 (D.C. Cir. 2007) (imposing USF contribution obligations on interconnected VoIP providers, irrespective of the ultimate classification of VoIP); *VoIP E911 Order*, ¶¶ 22-25.

[17] *Wireless Broadband Order*, ¶ 45.

data serving nodes, gateways, or other forms of data routers," not to the PSTN.[18] The fact that services accessed via broadband permit users to purchase stocks does not subject broadband providers to securities regulation. Broadband services are not subject to food and drug regulations, even though broadband can be used (with other services and applications) to order both. Blurring the line between distinct services—such as VoIP and broadband Internet access—would be a significant departure that would only hasten the spread of regulation to additional Internet-based services.[19]

Some Title II advocates claim, relatedly, that mobile broadband Internet access services interconnect with the public switched network because VoLTE services do.[20] VoLTE, however, is a facilities-based and managed VoIP offering that does not use and is not carried over the Internet access service and does not traverse the Internet. VoLTE is thus fundamentally distinct from broadband Internet access service, and, under the terms of the *2010 Open Internet Order*, is the prototypical "specialized service."[21] Therefore, this distinct service cannot transform mobile broadband Internet access into CMRS.[22]

VoIP Likewise Does Not Render Mobile Broadband the "Functional Equivalent" of CMRS. Several commenters alternatively contend that even if VoIP does not convert broadband into CMRS, it at least makes broadband the "functional equivalent" of CMRS.[23] This argument is fatally flawed as both a procedural and substantive matter.

First, the Commission has not provided adequate notice to reverse course on mobile broadband service and treat it as a "functional equivalent" of CMRS. The Administrative

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[18] *Id.* ¶ 45 & n.118.

[19] Some argue that the "undeveloped" mobile broadband network of 2007 was distinct from the circuit switched network and that the distinction made in the *Wireless Broadband Order* "between calls made with native dialing capacity and calls made via VoIP applications is increasingly inapt." OTI/PK/CDT Letter at 5. These parties' revisionist history, however, is belied by that order's recognition that, even then, "a consumer could use a mobile handset with CMRS voice capability, along with Wi-Fi technology, that could work seamlessly between the consumer's cellular or PCS service and VoIP service." *Wireless Broadband Order* ¶ 10 n.41.

[20] *See* OTI/PK/CDT Letter at 5. *See also* OTI Nov. 17 Letter at 6.

[21] *See Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, ¶ 39 (2010) ("*2010 Open Internet Order*").

[22] To the extent VoIP services may sometimes be "bundled with available phones," OTI/PK/CDT Letter at 5, that also has no bearing on the regulatory classification of broadband Internet access. The "packaging of … multiple services does not by itself transform … [one] component … into" a different service. *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, ¶ 15 (2006), *vacated on other grounds sub nom. Quest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007) (offering of information service capabilities in prepaid calling card menus cannot transform the use of cards to make long distance calls into an information service).

[23] *See, e.g.*, OTI/PK/CDT Letter at 7-8; OTI Nov. 17 Letter at 6.

Procedure Act (APA) requires an agency to provide notice of proposed rule changes,[24] and such notice "must describe the range of alternatives being considered with reasonable specificity."[25] The Notice of Proposed Rulemaking here asked only whether mobile broadband Internet access service "fit[s] the definition of 'commercial mobile radio service.'"[26] It never mentioned the definition of PMRS, which includes the "functional equivalent" language. Still worse, the course pushed by Title II advocates here would constitute a two-fold reversal of course from the *2014 NPRM*'s proposals. The *2014 NPRM* proposed to continue regulating broadband Internet access as an integrated information service and to subject mobile broadband to different rules than fixed broadband.[27] The agency may adopt a framework that is the "logical outgrowth" of its proposal,[28] but that category "certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse."[29] Moreover, comment by parties cannot overcome the agency's failure to provide notice: the requisite "notice necessarily must come—if at all—from the agency."[30] The Commission thus could not deem mobile broadband the functional equivalent of CMRS in this proceeding.

Title II advocates' functional equivalence argument also fails on the merits. The primary criterion in determining whether a given service is the functional equivalent of CMRS is "whether the service is a close substitute for CMRS."[31] Indeed, the Commission emphasized its expectation that "very few mobile services that do not meet the definition of CMRS will be a close substitute for [CMRS]" and thus "the functional equivalent of CMRS."[32] Because mobile broadband Internet access service cannot, on its own, be used to place calls to telephone numbers, and CMRS cannot be used to connect with (for example) Google's search engine or Amazon.com or any of the millions of other sources of online content, these two services are not substitutes, and cannot be deemed "functionally equivalent."

Vonage cites the recent *Sixteenth Wireless Competition Report* for its contention that some text and data messaging services have become partial substitutes for CMRS.[33] But even if that were true, it would only be relevant to whether these messaging services were themselves the functional equivalents of CMRS—not to whether the underlying mobile broadband service

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[24] *See* 5 U.S.C. § 553.
[25] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).
[26] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 150 (2014) ("*2014 NPRM*").
[27] *See id.*, ¶ 142 ("We propose that the Commission exercise its authority under section 706, consistent with the D.C. Circuit's opinion in Verizon v. FCC, to adopt our proposed rules."); ¶ 62 (tentatively concluding to maintain the fixed/mobile distinction).
[28] *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014).
[29] *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 997-98 (D.C. Cir. 2005).
[30] *Small Refiner*, 705 F.3d at 550.
[31] *Second CMRS Order* ¶ 80.
[32] *Id.* ¶ 79.
[33] *See* Vonage Letter at 8-9.

is. Again, the fact that one service or application accessed through broadband has particular functionalities does not affect the proper classification of the broadband service itself.

Other commenters claim that the legislative history shows that Congress intended a broad, flexible scope for CMRS and its functional equivalents, quoting a concern expressed in a House Report on the bill that became Section 332 that services similar to CMRS were being treated differently.[34] The *Second CMRS Order* demonstrates, however, that the services addressed in the House Report's discussion were "interconnected with the public switched telephone network," and thus quite similar to other common carrier wireless services, including "specialized mobile radio service" and "private carrier paging licensees."[35] The Commission ultimately classified those services as CMRS to the extent they were interconnected with the public switched network.[36] Those services thus have no similarity to broadband Internet access services.

The Act Bars the Commission from Amending its Rules to Treat the Internet as the Public Switched Network. The Title II proponents further argue that the Commission may simply redefine the statutory term "public switched network" to mean the Internet, thus rendering mobile broadband an "interconnected" CMRS offering. Here too, the Commission did not provide notice of this significant change of course, or seek comment on the potential consequences of this change to its rules. In any event, the context in which Congress adopted the provisions at issue and the legislative history demonstrate that Congress used the term "public switched network" to mean the PSTN, and nothing in the Act permits the Commission to reverse Congress on this point.[37]

First, as with the "functional equivalence" issue, the Commission has not provided the requisite APA notice that it might amend its definition of "public switched network" here. As noted above, the *2014 NPRM* asked only whether mobile broadband Internet access service "fit[s] the definition of 'commercial mobile radio service.'"[38] The Commission did not seek comment on changing any of its definitions to re-define "the public switched network" to mean the Internet writ large. Given the lack of notice on this point, parties have not had the opportunity to comment on the consequences of redefining "the public switched network" in this way, and the Commission lacks a record on the potentially significant effects of such a change of course. For example, if all mobile offerings permitting interconnection with IP address endpoints constitute CMRS, and an entity offering CMRS must "be treated as a common carrier" except insofar as the Commission forbears from particular requirements,[39] then it is possible that

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[34] *See* OTI/PK/CDT Letter at 7 (quoting H.R. Rep. 103-111, at 259-60 (1993) ("House Report")).
[35] *Second CMRS Order* ¶ 78.
[36] *See id.* ¶¶ 90-91, 95-97.
[37] *See Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985) (agency cannot adopt an interpretation that "would produce a result in conflict with the legislative purpose clearly manifested in a . . . statutory scheme or with clear legislative history.").
[38] *2014 NPRM*, ¶ 150.
[39] 47 U.S.C. § 332(c)(1)(A).

the amendment sought by Title II advocates could extend a broad swathe of regulations—such as universal service mandates, Customer Proprietary Network Information requirements, and entry and exit regulation—to a range of services that use the Internet over mobile connections and communicate with other IP endpoints. For example, would such requirements apply to Internet-based VoIP or messaging services offered by Vonage or others; to streaming music or video services transmitted over the Internet by Netflix or others; or to Internet search engines or related Internet transport services? Difficult issues such as these warrant comment, but the absence of notice has precluded their full exploration.

In any case, as noted above, Congress' reference to "the public switched network" was clear, and precludes re-defining the term to mean the Internet. When Congress adopted the definitions at issue here, the term "the public switched network" was a term of art understood to mean "the public switched telephone network." By the time Congress adopted the CMRS definition in 1993, the Commission had for years used these two terms interchangeably.[40] For example, in 1992 it explained that its cellular service policy was to "encourage the creation of a nationwide, seamless system, interconnected with the public switched network so that *cellular and landline telephone customers* can communicate with each other on a universal basis."[41] In 1991 it had stated that "800 numbers generally must be translated into [plain old telephone service] numbers before 800 calls can be transmitted over the public switched network."[42] The courts had similarly used "public switched network" to mean the PSTN.[43] It is axiomatic that

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[40] *See* Verizon White Paper, "Title II Reclassification and Variations on That Theme: A Legal Analysis," GN Dkt. Nos. 14-28, 10-127, at 13 (2014) ("Verizon White Paper").

[41] *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 7 FCC Rcd 719, ¶ 9 (1992) (emphasis added).

[42] *Provision of Access for 800 Service*, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421, ¶ 1 n.3 (1991), *recon. on other grounds*, Memorandum Opinion and Order on Further Reconsideration, 8 FCC Rcd 1038 (1993). *See also Report of the FCC Regarding the President's Regulatory Reform Program*, 1992 FCC LEXIS 3331 at *20 (competitive satellite customers were prohibited from "connecting with the 'public switched network' used for normal voice and data telephone service."); *Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990*, Notice of Proposed Rulemaking, 5 FCC Rcd 7187, ¶ 20 (1990) ("subscribers to every telephone common carrier's interstate service, including private line, public switched network services, and other common carrier services. . ."); *MTS and WATS Market Structure*, Order Inviting Further Comments, 1985 FCC LEXIS 2900 at *2 (Fed.-State Jt. Bd. 1985) ("costs involved in the provision of access to the *public switched network*[] are assigned . . . on the same basis as . . . the local loop used by subscribers to access the *switched telephone network.*") (emphasis added); *Applications of Winter Park Tel. Co.*, Memorandum Opinion and Order, 84 FCC2d 689, ¶ 2 n.3 (1981) ("the public switched network interconnects all telephones in the country.").

[43] *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982) ("[WATS] calls are switched onto the interstate long distance telephone network, known

"when a statute uses . . . a term [of art], Congress intended it to have its established meaning."[44] Indeed, Congress again made clear in statutory language adopted *just two years ago* that it continues to view the term "public switched network" as excluding the "public Internet." There, in describing the duties of the First Responder Network Authority, Congress indicated that the interoperable public safety network must provide connectivity to "the public Internet or the public switched network, or both." 47 U.S.C § 1422(b). This clear and consistent language precludes any redefinition that would conflate the PSTN and the Internet.

The House Conference Report similarly confirms that Congress used the term "the public switched network" to mean "[p]ublic switched *telephone* network."[45] While some Title II advocates state that Verizon and CTIA have mischaracterized the relevant language in a previous filing, it is these parties that mistakenly confuse the legislative history *describing* the bill with the bill's actual text. They claim that the Report "delet[ed]" the word "telephone" by rejecting the phrase "public switched telephone network" in the House bill and adopting instead the phrase "public switched network" in the Senate bill.[46] But this is simply wrong: The House bill *did not use the term "public switched telephone network*." Instead, like the Senate bill,[47] the House bill defined "commercial mobile service" as a mobile service that is, *inter alia*, "interconnected" "with the public switched network."[48] The Conference Report, however, *described* the House bill as requiring interconnection with the "Public switched telephone network."[49] Thus, the Conference Report confirms that Congress used the terms "public switched network" and "[p]ublic switched telephone network" interchangeably.[50]

Remarkably, the legislative history argument put forward by these parties also ignores the language in the House Report they quote, which expresses the concern that some wireless common carrier services "interconnected with the public switched *telephone* network" were not being treated similarly to other CMRS.[51] This Congressional recognition that interconnection

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as the public switched network, the same network over which regular long distance calls travel.") (quoted in *American Tel. and Tel. Co.*; *Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*, Memorandum Opinion and Order, 91 FCC2d 338, ¶ 16 (1982)).

[44] *McDermott Int'l. Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

[45] *See* H.R. Rep. 103-213, 103d Cong., 1st Sess. 495-96 (1993) ("Conference Report") (emphasis added); *see* Verizon White Paper, at 13-14.

[46] OTI/PK/CDT Letter at 3; OTI Nov. 17 Letter at 7.

[47] The initial Senate bill, S. 1134, used the phrase "public switched network" in the definition of "interconnected service." S. 1134, 103d Cong. § 409 (as introduced, June 22, 1993). On June 24, 1993, the Senate passed the House bill, H.R. 2264, with amendments. That version also used the same phrase. *See* 139 Cong. Rec. S. 7913 (June 24, 1993).

[48] H.R. 2264, 103d Cong. § 5205 (1993). *See* 139 Cong. Rec. H. 2997 (May 27, 1993).

[49] Conference Report at 495.

[50] The interchangeability of the two terms is also revealed by the Conference Report's silence regarding the absence of the word "telephone" in the adopted language. *See id.* at 495-96.

[51] OTI/PK/CDT Letter at 7 (quoting House Report at 259-60) (emphasis added).

with the PSTN is the litmus test for CMRS is further confirmation that interpreting "public switched network" to include the Internet would violate the legislative intent underlying Section 332.

Nor is there any merit to the suggestion[52] that the Commission must view mobile broadband as CMRS or its equivalent in order to resolve a "contradiction" between the requirement that a telecommunications service be treated as a common carrier service[53] and Section 332(c)(2)'s prohibition against subjecting private mobile service to such requirements.[54] Any such "contradiction" is illusory. As the Commission held in 2007, mobile broadband is both an information service and PMRS, and therefore is doubly immune from common carrier mandates.[55]

Ultimately, the Title II advocates are left to argue that Congress simply *must* have intended for the term CMRS to encompass mobile broadband, because "Congress was keenly aware of the need to extend the utility of the 'public switched network' beyond telephony to high-speed Internet access," and, thus, "it would have been extraordinarily shortsighted if Congress had tied the Commission's hands" by limiting Title II's coverage to services that interconnect with the PSTN.[56] But this argument is both unsupported by the text or history of the statute and is circular: these parties *assume* that Congress must have intended for common carrier requirements to apply to broadband services, and use that assumption to "prove" that this is so. The Commission, of course, must interpret statutes based on the text and actual evidence of Congressional intent. These sources, as explained above, demonstrate that Congress meant to insulate from common carrier treatment services that do not interconnect with the PSTN.

Sincerely,

William H. Johnson

cc: Roger Sherman
Brian Regan
Joel Taubenblatt
Stephanie Weiner

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[52] OTI/PK/CDT Letter at 8-9; OTI Nov. 17 Letter at 8-9.
[53] 47 U.S.C. § 153(51).
[54] *Wireless Broadband Order*, ¶¶ 48-56.
[55] *Id.*
[56] OTI/PK/CDT Letter at 4, 6-7; OTI Nov. 17 Letter at 5.